85-1974

No. _____

Supreme Court, U.S.
FILED
MAY 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD A. WHITTINGTON
AND
W. LEWIS DeMOSS
Petitioners

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

WELLBORN JACK, JR.
Counsel of Record
JACK & HUDSMITH
101 Milam
Shreveport, LA
Tel. (318) 227-9638
(Attorneys for
W. Lewis DeMoss)

BOBBY D. SUTTON
Counsel of Record
GLENN E. WALKER
Of Counsel
BURNETT, SUTTON,
WALKER & CALLAWAY
(A Professional Law Corporation)
1400 Youree Drive
Shreveport, LA
Tel. (318) 221-3131
(Attorneys for
Richard A. Whittington)

96 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

(1) Does the Fifth Circuit's rule as to availability of defense witness use immunity conflict with the decisions of this Court and those of the Second and Third Circuits, and, should the Court resolve the conflict?

(2) Does the Fifth Circuit's rule violate a defendant's Sixth Amendment right to compulsory process, and/or his Fifth Amendment right to due process, by refusing to compel the grant of use immunity to a defense witness who has invoked the Fifth Amendment protection against self incrimination when:

(a) The witness' testimony is material, exculpatory, non-cumulative and available from no other source; and

(b) The witness' exercise of the privilege against self-

incrimination is precipitated by the prosecutor's actual and communicated threat that if he testified for the defense, he would be indicted for perjury as a result; and

(c) The prosecutor has granted immunity to government witnesses who testified as to the same particular issue?

LIST OF PARTIES

The parties to this proceeding below were petitioners W. Lewis DeMoss and Richard A. Whittington, along with Richard Wolfe, all of whom were defendants. The United States was also a party.

The respondent before this court is the United States.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES.....	iv
OPINION BELOW.....	2
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS CITED.....	4
STATEMENT OF THE CASE.....	13
REASON FOR GRANTING THE WRIT.....	22
I. The Fifth Circuit Rule as to the availability of defense witness use immunity conflicts with the doctrines of this Court and with the Second and Third Circuits.....	22
II. The Fifth Amendment due process clause and/or the Sixth Amendment compulsory process clause are breached by the Fifth Circuit rule that, absent government abuse, a dependant has no right to defense witness immunity for the purpose of presenting essential, exculpatory, testimony.....	24
CONCLUSION.....	32

APPENDIX

Opinion of the Fifth Circuit dated February 27, 1986..... 1a

Opinion of the Fifth Circuit on rehearing, dated April 2, 1986..... 42a

TABLE OF AUTHORITIES

Page

UNITED STATES CONSTITUTION:

Fifth Amendment.....4, 20, 21, 24 26, 29, 30

Sixth Amendment.....4, 21, 24, 28, 29

Fourteenth Amendment.....5, 29

UNITED STATES CODE:

18 U.S.C. 2.....3, 5, 13

18 U.S.C. 287.....3, 6, 13

18 U.S.C. 371.....3, 6, 13

18 U.S.C. 1001.....3, 7, 13

18 U.S.C. 6002.....8, 27

18 U.S.C. 6003.....9, 27

28 U.S.C. 1254(1).....4, 7

CODE OF FEDERAL REGULATIONS:

7 C.F.R. 1430.402(c).....3, 10

7 C.F.R. 1430.403(c).....3, 10, 15

7 C.F.R. 1430.406.....3, 11, 12, 15

LOUISIANA REVISED CIVIL CODE:

Article 1767 (West Special Pamphlet, 1986).....12, 17

Article 1769 (West Special Pamphlet, 1986.....12, 17

UNITED STATES SUPREME COURT
JURISPRUDENCE:
Autry v. McKaskle, 465 U.S. 1085, 79 L.Ed.2d 909, 104 S.Ct. 1458 (1984).....22, 23

Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297, 93 S.Ct. 1038 (1973).....29

Murphy v. Waterfront Commission, 378 U.S. 52, 12 L.Ed. 2d 678, 84 S.Ct. 1594 (1964)..25, 26

Simmons v. United States, 390 U.S. 377, 19 L.Ed.2d 1247, 88 S.Ct. 967 (1968).....25

Washington v. Texas, 388 U.S. 14, 18 L.Ed.2d 1019, 87 S.Ct. 1920 (1967).....28

Williams v. Florida, 399 U.S. 78, 26 L.Ed.2d 446, 90 S.Ct. 1893 (1970).....29

Webb v. Texas, 409 U.S. 95, 34 L.Ed.2d 330, 93 S.Ct. 351, (1972).....29

UNITED STATES CIRCUIT COURT
JURISPRUDENCE:
Autry vs. Estelle, 706 F.2d 1394 (5th Cir. 1983).....22

Earl vs. United States, 361 F.2d 531 (D.C. Cir. 1966).....30

Government of Virgin Islands vs. Smith, 615 F.2d 964 (3d Cir. 1980).....22, 27 28

United States vs. Burns, 684 F.2d 1066 (2d Cir. 1982).....23, 30, 31

United States vs. Herman, 589 F.2d 1191 (3d Cir. 1978).....25, 27, 28

United States vs. Morrison, 535 F.2d 223 (3d Cir. 1976).....27, 28

United States vs. Thevis, 665 F.2d 616 (5th Cir. 1982).....25, 26

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. _____

RICHARD A. WHITTINGTON
and
W. LEWIS DeMOSS
Petitioners

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

The petition of Richard A. Whittington and W. Lewis DeMoss respectfully prays that a writ of

certiorari issue to review the judgment and opinion of the Fifth Circuit, entered in the above-entitled proceedings on February 27, 1986, and on rehearing on April 2, 1986.

OPINIONS BELOW

The February 27, 1986 Opion by the Court of Appeals for the Fifth Circuit is reported at 783 F.2d 1210. The Fifth Circuit Opinion on rehearing, dated April 2, 1986, is reported at 786 F.2d 644.

The district court issued no written opinion.

JURISDICTION

This criminal prosecution commenced in the Western District of Louisiana charging each of three defendants with four counts involving submitting a false

claim for benefits under the Dairy Production Stabilization Act of 1983.[1] Count one charged a conspiracy under 18 U.S.C. 371 with substantive offenses under 18 U.S.C. 1001 and 2, and 18 U.S.C. 287 and 2. Count two alleged a false statement, as denounced by 18 U.S.C. 1001 and 2. Count three alleged a false claim under 18 U.S.C. 287 and 2. Count four alleged a false writing under 18 U.S.C. 1001 and 2.

Petitioners Whittington and DeMoss were convicted on all four counts.

On February 27, 1986, the Fifth Circuit affirmed. Following timely

---

1

The Dairy Production Stabilization Act, P.L. 98-180, 97 Stat. 1128 (1983) was passed into law on November 29, 1983. The particular regulations involved are appeared in the Federal Register/Vol. 49, No.2/ Wednesday, January 4, 1984, as 7 C.F.R. 1430.402(c), 7 C.F.R. 1430.403(c) and 7 C.F.R. 1406.

application, the Circuit Court afforded no relief in its April 2, 1986, opinion on rehearing.

The jurisdiction of this court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS CITED

Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, United States

Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment, Section 1, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, 18 U.S.C. 2:

> (a) Whoever commits an offense against the United States or aids,

abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

United States Code, 18 U.S.C. 287:

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

United States Code, 18 U.S.C. 371:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for each misdemeanor.

United States Code, 18 U.S.C. 1001:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

United States Code, 18 U.S.C. 1254(1):

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court

of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

United States Code, 18 U.S.C. 6002:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to-

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this

part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

United States Code, 18 U.S.C. 6003:

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States Attorney may, with the approval of the Attorney General, the Deputy Attorney

General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment--

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Code of Federal Regulations, January,

1984, 7 C.F.R. 1430.402(c):

"Base Period" means calendar year 1982 or calendar years 1981 and 1982, whichever the producer has elected for the purpose of establishing a milk base.

Code of Federal Regulations, January,

1984, 7 C.F.R. 1430.403(c):

(c) Producer eligibility. In order to be eligible to enter into a contract with CCC, a producer must:

(1) Be a producer of milk in the United States:
(2) Be actively engaged in the production of milk as of November 28, 1983;

(3) Have submitted a milk reduction plan to the county ASCS office in the headquarters county in accordance with the provisions of § 1430.404 of this subpart;
(4) Have established a milk base in accordance with § 1430.405 of this subpart; and
(5) Not have sold, leased or otherwise transferred either directly or indirectly, after November 8, 1983 and through the date an offer to enter into the milk diversion contract is submitted, dairy cows which would or could have been used for the production of milk during the contract period unless:

(i) The transfer is a sale, lease or other transfer of dairy cows to another producer who executes a milk diversion contract with CCC;
(ii) The transfer is a sale of dairy cows for slaughter and the cattle are, in fact slaughtered;
(iii) The cows are sold and delivered for export: Provided, that the producer is divested of all interest in such cows and the cows do not re-enter the United States; or
(iv) Such sale, lease or transfer occurs before January 1, 1984, and the Administrator, ASCS, or his designee has determined that such sale, lease or transfer does not defeat the goals of the Milk Diversion Program provided for in this subpart.

Code of Federal Regulations, January,

1984, 7 C.F.R. 1430.406:

> Marketing history may be transferred by a producer to another person only if the producer's entire interest in the milk production facility and the producer's entire interest in the entire dairy herd has been transferred directly to the person claiming such history and such transfer of interest was made as a result of: (a) The death of the producer; (b) a gift from the producer; or (c) a transfer to a member or members of the family of the producer. The term "member of the family of the producer" as used in this section shall mean: (a) An ancestor of the producer; (b) the spouse of the producer; (c) a lineal descendant of the producer, or the producer's spouse, or a parent of the producer; or (d) the spouse of any such lineal descendant.

Louisiana Revised Civil Code, Article

1767 (West Special Pamphlet, 1986):

> A conditional obligation is one dependent on an uncertain event.
>
> If the obligation may not be enforced until the uncertain event occurs, the condition is suspensive.
>
> If the obligation may be immediately enforced but will come to an end when the uncertain event

> occurs, the condition is resolutory.

Louisiana Revised Civil Code, Article 1769 (West Special Pamphlet, 1986):

> A suspensive condition that is unlawful or impossible makes the obligation null.

STATEMENT OF THE CASE

Petitioners were convicted in a bench trial before the District Court for the Western District of Louisiana of four offenses involving submitting a false claim under the Dairy Production Stabilization Act of 1983. Prosecution was under various combinations of 18 U.S.C., sections 2, 287, 371 and 1001. The convictions were affirmed by the Fifth Circuit and relief was likewise denied on rehearing.

The central and decisive issue at trial was the proper characterization of a document which was relied upon by the government as the heart of its case, and introduced as Government Exhibit Number 1.

The defendants contended the document was but an interim draft which never became effective: the government contended it was an effective lease between the parties.

Resolution of this pivotal issue depended upon a critical evaluation of all the facts and circumstances surrounding the confection of the document.

The government was able to present its side of the facts and circumstances through immunized testimony; the defendants were denied an opportunity to present their side of the evidence.

The Dairy Production Stabilization Act was signed into law on November 29, 1983. It provided that a milk producer who had no base period of production in 1982 was ineligible to apply for benefits even though he was producing as of November 28, 1983. Conversely, a milk producer who had a base period in 1982 was ineligible to apply for benefits if he had ceased operations prior to November 28, 1983. In the context of this case, a producer with a 1982 base period would remain subsidy-eligible if its operations were being managed by another on the eligibility date but not if it had leased its operations to another as of that date.[2]

---

[2] (P.L. 98-180, 97 Stat. 1128 (1983); 7 C.F.R. 1430.403(c); 7 C.F.R. 1430.406 (1984).)

This case involved the relationship between two corporations: Louisiana Pacific Resources, Inc., and Triple Crown Farms of Louisiana, Inc. Whittington and DeMoss were respectively the president and (part-time) comptroller of Louisiana Pacific; the third original defendant, Wolfe, was an officer of Triple Crown. Louisiana Pacific had a base period in 1982, but Triple Crown did not. The central issue was whether Triple Crown was managing Louisiana Pacific's operations as of November 28, 1983, or whether as of that time Louisiana Pacific had leased its operation to Triple Crown.

Triple Crown wanted to buy Louisiana Pacific's 1600 acres of land, but did not want the dairy. Negotiations between the parties for acceptable terms of the real estate sale explored several different draft formats: options, exchanges, leases, assumptions, etc.; one

of the interim drafts (Government Exhibit Number 1) was a lease, subject to several suspensive conditions[3] which were never met. (The Government would ultimately contend that the lease was effective and that Louisiana Pacific was not, therefore, subsidy-eligible.)

During sales negotiations between Louisiana Pacific and Triple Crown, Triple Crown managed the dairy, and in fact it continued to do so through and beyond what came to be the eligibility date, November 28, 1983. In Januqary of 1984, Louisiana Pacific applied for subsidy payments. In February or March, 1984, at the request of the Department of

---

3

Under Louisiana law a suspensive condition prevents a contract from becoming binding unless the conditions are fulfilled. Louisiana Civil Code, Articles 1767 and 1769 (West Special Pamphlet, 1986).

Agriculture, an agreement was signed between Louisiana Pacific and Triple Crown, memorializing the management relationship that had existed under oral contract since September 1, 1983. In April of 1984, Louisiana Pacific received $139,741.40 in subsidy payments.

As the government proceeded, it subpoenaed Johnny D. Terrell, Triple Crown's bookkeeper, to testify before a grand jury. He verified that there was a management agreement, rather than a lease. On September 12, 1984, the government indicted Terrell for perjury based upon his grand jury testimony.

Government agents also questioned Murray Lynn, the banker in charge of Louisiana Pacific's loan at Bossier Bank and Trust Company, on two different occasions. He substantiated that the lease was never effective and verified that Triple Crown was merely managing the

operation for Louisiana Pacific. As the trial date approached, the government communicated to him that he was "under investigation" for obstruction of justice due to his responses to their questions, and if he testified for the defense, he would be indicted for perjury.

Terrell has never been brought to trial and Lynn was never indicted for obstruction of justice.

Shortly before the trial, which had been scheduled to begin October 15, 1984, the government issued grand jury subpoenas; among those subpoenaed was Murray Lynn, as well as a host of other potential defense witnesses. The subpoenas were ordered quashed by the United States Magistrate who found that, "...[T]he 'primary purpose' of calling these witnesses to the Grand Jury one week prior to the scheduled trial is not to continue an ongoing investigation, but

to assist the United States Attorney in the preparation for trial of a pending indictment." The Fifth Circuit affirmed.

The bench trial commenced on October 15, 1984.

The government granted immunity to Sharon Renee Pope and Belinda Keener, Lynn's subordinates at Bossier Bank, who testified as to their knowledge of the lease draft.

During trial, Murray Lynn appeared in response to his defense subpoena. To emphasize the prior threat to indict if he testified for the defense, Lynn was at that time handed a subpoena in the courtroom at the instruction of the United States Attorney, subpoenaing him as a government witness.

Johnny Terrell likewise appeared in response to a defense subpoena.

Both Lynn and Terrell claimed the Fifth Amendment privilege against self

incrimination. The defense requested the goverment be ordered to grant use immunity to both Lynn and Terrell, or in the alternative that the court grant them use immunity. Immunity for either witness on either basis was refused--in Lynn's case after an in camera hearing. The trial proceeded.

Whittington and DeMoss were ultimately convicted on all four counts, and Wolfe on counts one and four.

The case was appealed to the Fifth Circuit, with the conflict between petitioners' guarantees under the Fifth and Sixth Amendments with the rights of Lynn and Terrell under the Fifth Amendment specifically urged. The Fifth Circuit affirmed the conviction on February 27, 1986, and issued a second opinion on April 2, 1986, again denying relief upon a request for rehearing.

This application followed.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit rule as to availability of defense witness use immunity conflicts with the doctrines of this Court and with the Second and Third Circuits.

The conflict is clearly presented. The Fifth Circuit held that, "Although the Third Circuit has held differently, we have rejected its view and held in Autry v. Estelle that in the absence of governmental abuse the court may not direct the government to grant use immunity to a defense witness who invokes the fifth amendment."[4]

The conflict was previously noted by the Court in the Autry matter, Autry vs.

4

Opinion of February 27, 1986 at page 24. See the Third Circuit view in Government of Virgin Islands v. Smith, 615 F.2d 964, 969 (3d Cir. 1980); see Autrey v. Estelle, 706 F.2d 1394, 1401 (5th Cir. 1983).

McKaskle, 465 U.S. 1085, 79 L.Ed.2d 909, 104 S.Ct. 1458 (1984), (Justice Marshall joined by Justice Brennan dissenting in denial of certiorari)[5] The Second Circuit has suggested a formula falling between the doctrines of the Third and Fifth Circuits.[6]

The conflict between the circuits is to a substantive issue that directly affects an accused's constitutional rights; the result is that a defendant's substantive constitutional protections are presently determined by the circuit in which he is being tried. The nature of the conflict, both before this Court

---

5

"Certiorari should be granted to resolve this conflict." Id. at 1087-1088.

6

United States v. Burns, 864 F.2d 1066, 1077 (2d Cir. 1982).

and among the Circuits is developed in Part II, below. It should be resolved.

II. The Fifth Amendment due process clause and/or the Sixth Amendment compulsory process clause are breached by the Fifth Circuit rule that, absent government abuse, a defendant has no right to defense witness immunity for the purpose of presenting essential, exculpatory testimony.

Dismissing the government's conduct in this case as merely "unseemly,"[7] and consequently finding no abuse, the Fifth Circuit Court's interpretation of due process is explained: "[D]istrict Courts may not grant immunity to defense witnesses simply because that witness has

---

7 Fifth Circuit opinion of February 27, 1986, at page 24.

essential exculpatory information unavailable from other sources." United States vs. Thevis, 665 F.2d 616, 639 (5th Cir. 1982). Moreover, "No Fifth Circuit case has upheld a grant of immunity by a trial court, and our cases have strongly suggested, without specifically deciding, that courts lack such power under any circumstances."[8] United States vs.

8

cf, United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978): "The Supreme Court has authorized such grants in suppression hearings where the defenant's testimony is necessary in order to determine whether a violation of his fourth amendment rights has occurred. Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).**** It would seem that a case in which clearly exculpatory testimony would be excluded because of a witness's assertion of the fifth amendment privilege would present an even more compelling justification for such a grant than that accepted in Simmons itself." See also Murphy v. Waterfront Commission, 378 U.S. 52, 12 L.Ed.2d 678, 84 S.Ct. 1594 (1964), prohibiting government use of testimony

(Footnote Continued)

Thevis, supra at 665 F.2d 639, n.25. This is said to be true in part because "a trial is not a 'symmetrical proceeding' which requires a court to grant the defendant's witness immunity because the government uses immunized witneses." United States vs. Thevis, supra at 665 F.2d 641, n.28.

Acting under the Sixth Amendment compulsory process clause and the Fifth Amendment due process clause, the United States Third Circuit Court of Appeal has fashioned a two part rule for evaluating entitlement to defense witness immunity. Where the government has initially refused to immunize the witness "with the deliberate intention of distorting the

---

(Footnote Continued)
compelled in violation of Fifth Amendment right against self incrimination.

factfinding process," the court is authorized to enter a judgment of acquittal unless the government consents to grant statutory[9] use immunity. Government of Virgin Islands vs. Smith, 615 F.2d 964, 969 (3rd Cir. 1980). See also United States vs. Morrison, 535 F.2d 223 (3d Cir. 1976) and United States vs. Herman, 589 F.2d 1191 (3d Cir. 1978). In addition, the Third Circuit holds that judicial immunity can be extended by the court in the absence of a strong countervailing goverment interest if the testimony is essential to the defendant's case, exculpatory, non-cumulative and not merely for the purpose of attacking the credibility of government witnesses.

9

18 U.S.C. 6002, 6003.

Virgin Islands vs. Smith, supra, at 615 F.2d 972; Morrison and Herman, supra.

Aside from the conflict with the Third Circuit, the Fifth Circuit doctrine conflicts with the established jurisprudence of this Court. Compulsory process under the Sixth Amendment goes beyond "the futile act of giving a defendant the right to secure the attendance of witnesses whose testimony he [has] no right to use." Washington vs. Texas, 388 U.S. 14, 23, 18 L.Ed.2d 1019, 1025, 87 S.Ct. 1920, 1925 (1967). Rather, it is "in plain terms the right to present a defense," Id. at 19, "a fundamental right of due process of law." Id. at 19. Washington thus struck down an arbitrary state law disqualifying alleged accomplice testimony which was "relevant and material to the defense." Id. at 23. A criminal trial is a search for truth and not to be reduced to a mere

"poker game" to be won by he who plays best. Williams v. Florida, 399 U.S. 78, 82, 26 L.Ed.2d 446, 450, 90 S.Ct. 1893, 1896 (1970). Thus, a rule against impeaching one's own witness yielded to a due process challenge in Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297, 93 S.Ct. 1038 (1973): "Few rights are more fundamental than that of an accused to present witnesses in his own defense." Id. at 302. See also Webb v. Texas, 409 U.S. 95, 34 L.Ed.2d 330, 93 S.Ct. 351 (1972), where due process was held breached by a judicial admonition provoking a defense witness into claiming the privilege against self incrimination.

Petitioner maintains that, as in these Fourteenth Amendment cases, there is a similar merging of the Sixth Amendment right to an effective defense into the Fifth Amendment right to due process. Indeed, Justice, then Judge,

Burger has suggested a Fifth Amendment due process violation arising from the government utilizing immunized testimony while declining to immunize defense witnesses. Earl v. United States, 361 F.2d 531, 534 n.1, (D.C. Cir. 1966).

The Second Circuit has suggested a formula that falls between the conflicting Third and Fifth Circuit doctrines:

> To sustain a requirement that use immunity be granted, a court must find that: (1) the government has engaged in discriminatory use of immunity to gain a tactical advantage or, through its own overreaching has forced the witness to invoke the Fifth Amendment; and (2) the witness' testimony will be material, exculpatory and not cumulative and is not available from any other source. United States vs. Burns, 864 F.2d 1066, 1077 (2d Cir. 1982); [Emphasis supplied.]

The Second Circuit thus suggests that the government's seeking of tactical advantage or overreaching, while not necessarily rising to the level of either

abuse or deliberate intention of distorting the factfinding process, may, when coupled with a showing of defense witness essentiality, so far amount to a due process violation as to afford relief. The Second Circuit standard announced in Burns is a correct balancing of defense and government rights.

Witnesses Lynn and Terrell had essential, clearly exculpatory evidence to offer that was neither cumulative nor attainable from any other source. The government managed the immunity process to its tactical advantage -- it granted Ms. Keener and Ms. Pope immunity so that an appearance of the lease's effectiveness was created. It overreached. It indicted Terrell for perjury and threatened Lynn with an indictment for obstruction of justice and, if he testified, an indictment for

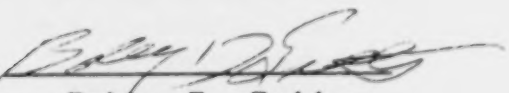
perjury. Yet, the government has never tried Terrell nor indicted Lynn.

CONCLUSION

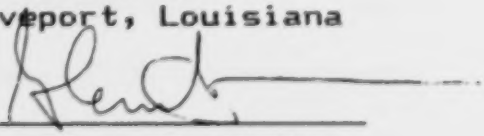
Writs should be granted to review and resolve the conflict.

Respectfully submitted,

BURNETT, SUTTON, WALKER
& CALLAWAY
(A Professional Law
Corporation)
1400 Youree Drive
Shreveport, Louisiana

By: 
Bobby D. Sutton
Counsel of Record
Attorneys for Richard
A. Whittington

BURNETT, SUTTON, WALKER
& CALLAWAY
(A Professional Law
Corporation)
1400 Youree Drive
Shreveport, Louisiana

By: 
Glenn E. Walker
Of Counsel
Attorneys for Richard
A. Whittington

May 30, 1986

JACK & HUDSMITH
101 Milam
Shreveport, Louisiana
Tel. (318) 227-9637

By: _____
Wellborn Jack, Jr.
Counsel of Record
Attorneys for W. Lewis
DeMoss

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

- - - - -

No. 84-4813

- - - - -

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICHARD A. WHITTINGTON,
RICHARD WOLFE and
W. LEWIS DeMOSS, JR.,
Defendants-Appellants.

- - - - -

Appeals from the United States District Court for the Western District of Louisiana

- - - - -

(February 27, 1986)

Before RUBIN, RANDALL, and WILLIAMS, Circuit Judges.

RUBIN, Circuit Judge:

The defendants were convicted in a bench trial of various offenses revolving around the alleged submission of a false claim for benefits under the federal Dairy Production Stabilization Act of 1983. In this appeal, they contend that

the district court improperly admitted in evidence a document crucial to the government's case, the evidence was insufficient to support their con-

viction, and the prosecution was guilty of misconduct in threatening to indict potential defense witnesses for perjury with the result that the witnesses claimed the protection of the fifth amendment and refused to testify. We hold that the district court acted within its discretion in admitting the document, the evidence was sufficient to support the conviction of each of the three defendants, and the prosecution did not violate the defendants' rights by its actions. We therefore affirm the judgment of conviction.

I.

The Dairy Production Stabilization Act[1/] was enacted in 1983 to subsidize

qualifying milk producers that contracted with the federal government to reduce milk production. To qualify for the subsidies, a milk producer had to be in production as of November 29, 1983, and establish a marketing history of production in the 1982 calendar year or earlier.[2/] Louisiana Pacific Resources, Inc., a company that had been engaged in the dairy business under the name of Riverland Dairy, received payments totaling $139,741.70 under the Act. One of the defendants, Richard C. Whittington, was president of that company and a member of its board of directors; another, Lewis DeMoss, a CPA, was a member of its board and employed part-time as its comptroller. The third defendant, Richard Wolfe, was an entrepreneur who had not been connected previously with the company.

1/ Dairy Production Stabilization Act of 1983, Pub. L. No. 98-180, 97 Stat. 1128 (1983).

2/ 7 U.S.C.A. §§ 1446(d) (3) (D) (iii), (F) (West Supp. 1985); 7 C.F.R. § 1430.403 (c) (1985).

By August 1983, before the Act was passed, Louisiana Pacific's dairy operations had become increasingly unprofitable and its financial condition was critical. The company owed a substantial amount of money to Bossier Bank and Trust Company, and was badly in debt to other creditors. Louisiana Pacific's chief asset was 1,600 acres of land that it used in its dairy operation, and Bossier Bank began advising, indeed, urging, Whittington to sell the dairy property.

Wolfe became interested in buying the property for real estate development. His interest hinged, however, on averting

foreclosure by the first mortgagee, so that the mortgage, which bore an attractive 9% interest rate, could be awsumed, and on satisfying the second mortgage in favor of the Far ers Home Mortgage Administration for an amount less than the balance due. Whittington and Wolfe began negotiations in the summer of 1983. Meanwhile, it was imperative for Louisiana Pacific to satisfy its creditors and to continue its operations while the negotiations with Wolfe and its mortgagees continued. Louisiana Pacific hoped in part to increase revenues by qualifying for payments under the

milk diversion program that was then pending in Congress. Although passage of the act was expected, exactly who would receive payments and on what basis was not known until after November 1983, the

month of its enactment. Whether Louisiana Pacific was the operator of the dairy on November 29 later became the determining factor in its eligibility for government benefits, but no one then knew what it would be.

Bossier Bank was pressing for progress in the negotiations between Whittington and Wolfe. The defendants contend that, by August 1983, the negotiations had advanced to the point that they were jointly considering ways to continue dairy operations while the negotiations continued. Wolfe did not want to be a dairy operator, but was willing to cooperate with Whittington to find a means to keep the dairy in business pending the sale. At the request of one of the defendants, a Shreveport lawyer had drafted a proposed commercial lease agreement. The defendants assert that this was for

discussion only. After a weekend of negotiations, on September 9, 1983, Whittington, acting for Louisiana Pacific, and Wolfe, acting for a company named Triple Crown Farms of Louisiana, Inc., agreed upon a document confected by Wolfe's California lawyer, entitled "Addendum for Notification (sic) of Commercial Lease Agreement," which stated it was effective September 1, 1983.

The government contends that this document was intended to be and was a lease in law and in fact. The defendants maintain that this document was never intended to have legal effect, but represented only "an interim effort" to accommodate the competing interests of Wolfe, who wanted to buy land but not a dairy, and Whittington, who was under pressure from the bank to demonstrate progress in negotiations. They further

contend that Wolfe agreed to execute the document only under several "suspensive" conditions, a type of condition that under Louisiana law prevents a contract from becoming binding unless the conditions are fulfilled.[3/] The conditions were never fulfilled, they argue, and the lease was never consummated. Instead, Wolfe and Whittington agreed orally, they say, on or about September 1, 1983, that Triple Crown would manage Riverland Dairy for Louisiana Pacific.

3/ See La. Civ. Code art. 1767 (West Special Pamphlet 1986).

The defendants maintain that Triple Crown continued to manage Riverland Dairy under the oral agreement until February or March, 1984, when a written management agreement was executed and backdated to

relfect the management relationship purportedly in effect since September 1983. In the meantime, in January, 1984, Louisiana Pacific applied for subsidies with the United States Department of Agriculture. In April, 1984, Louisiana Pacific

received $139,741.40 in subsidy payments under the milk diversion program.

The government contends that Louisiana Pacific was ineligible to receive the milk subsidies because although it could establish a base period of production for the 1982 calendar year, it was no longer in production on November 29, 1983, having by then leased the dairy to Triple Crown. Triple Crown was itself ineligible for the subsidies because it could not establish a 1982 base period. The defense asserted by the defendants was that Triple Crown had not

leased the dairy, but was simply managing it for Louisiana Pacific who remained eligible for the milk subsidy benefits.

The government indicted each defendant on four counts. Count one charged DeMoss, Whittington, and Wolfe with a conspiracy in violation of 18 U.S.C. § 371 (1982) to knowingly use false material statements and representations to the Bossier Parish Agricultural Stabilization and Conservation Service (ASCS) office, the United States Department of Agriculture, to influence that service regarding Louisiana Pacific's eligibility to participate in and to receive payments under the Dairy Production Stabilization Act in violation of 18 U.S.C. § 1001 (1982), and also with knowingly making false and fraudulent claims with the United States Department of Agriculture in violation of 18 U.S.C. § 287 (1982).

Counts two through four charged the defendants with the underlying substantive offenses. Count two charged them with the violation of 18 U.S.C. § 1001 in willfully causing false statements and representations to be made to the Department of Agriculture purporting to establish the existence of a farm management contract rather than a lease agreement between Louisiana Pacific and Triple Crown. Count three charged all three defendants with presenting to that department a claim for payment of $139,741.70 on behalf of Louisiana Pacific, knowing that it was not actually engaged in milk production on November 29, 1983, in violation of 18 U.S.C. § 287. And count four charged that all three knowingly and willfully made a false writing in the form of a letter dated April 18, 1984, representing the

management contract to have been effective since September 1983, when they knew that Triple Crown was the lessee of Riverland Dairy at that time, in violation of 18 U.S.C. § 1001.

The district court found DeMoss and Whittington guilty on all four counts, and Wolfe guilty on counts one and four.

II.

To prove that Louisiana Pacific was not the dairy's operator on November 29, but had by then leased the dairy to Triple Crown, the government sought to introduce the contested lease as Exhibit G-1. The multi-page document was itself a photographic copy of papers used to confect it, prepared in part by original typing

and in part by assembling excerpts from other documents. It purported to bear the signatures of Whittington and Wolfe.

Sharon Renee Pope, an employee of Bossier Bank, had signed the document as a witness. She identified her signature, as well as that of Murray Lynn, a vice president of the bank, who had also signed as a witness, Belinda Keener, another bank employee, and Richard Whittington. Although she had not actually seen Whittington sign G-1, she had signed the document as a witness because she was familiar with his signature. Belinda Keener had notarized the document. She testified that Lynn had brought G-1 to her and asked her to notarize it. While she said she did not remember whether she was present when the doucment was signed, she stated that she was familiar with Whittington's signature and recognized what appeared in the copy presented to her as a "facsimile" of his signature.

Neither witness could identify any of the pages in the document other than the signature page. Neither knew whether the specific pages attached to the proffered copy had been attached when she signed or whether other pages had been attached.

Over the defendants' objection, the district court admitted the document, G-1, Stating to defendants' counsel, "in the course of the trial, if you . . . present evidence that causes me then to be concerned about whether I made a proper ruling or not, you'll be privileged to again question the ruling and I'll give you that leave." The defendants, relying on Federal Rule of

Evidence 104,[4/] contend that there was no evidence that any part of G-1 other than the signature page was the same as the document originally signed by the

defenants, and that the court's ruling admitting the evidence was conditioned on the later introduction of evidence proving the identity of the rest of G-1.

4/ Fed. R. Evid. 104 reads in part:

> (b) Relevancy conditioned on fact. -- When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

The argument that the court admitted the document subject to a condition that the government produce additional evidence simply misinterprets the court's ruling. As the court plainly stated, it was instead affording the defendants, who were objecting to admission, an opportunity later during the trial to adduce evidence that might require reconsideration of the ruling.

To identify a document sufficiently to warrant its admissibility, a witness need not be able to attest familiarity with every page. Federal Rule of Evidence 901(a) provides that a document is admissible if identified "by evidence sufficient to support a finding that" it is "what its proponent claims." The rules "do not require absolute certainty in authentication."[5/]

Indeed, were it necessary for a witness to a document to identify every page of the document as a condition of admissibility, few documents would be admissible. A decision that a document is authentic and, therefore, admissible does not determine whether the evidence will be credited by the trier of fact. The opponent may then question whether the challenged document is the same as or different from the one originally signed.

As Weinstein's Evidence states, "Once the evidence is admitted the question becomes one of credibility and probative force and the trier may ultimately disbelieve the proponent's proof and entirely disregard or substantially discount the persuasive impact of the evidence admitted." [6/]

5/ Mauldin v. Upjohn Co., 697 F.2d 644, 648 (5th Cir.), cert. denied, 104 S.Ct 155 (1983). See also United States v. Clayton, 643 F.2d 1071 (5th Cir. 1981).

6/ J. Weinstein & M. Berger, Weinstein's Evidence par. 901(a) [01], 901-16-17 (1985).

G-1 was sufficiently identified by identification of its signature page. Two persons who signed in different capacities identified their signatures and the signature of one of the principals, Whittington. A signature may

be identified by testimony of a person familiar with the signature.[7/] It is not essential that the witness have been present when the signature was

executed. Proof that a document has been signed is sufficient to charge a signatory with its contents.[8/] After admitting G-1 on the basis of evidence sufficient to authenticate it, the court, in its separate role as trier of fact, was required to make an ultimate determination of its genuineness, including whether the entire document was sufficiently identified as the one signed by Whittington and Wolfe.

7/ Fed. R. Evid. 901(b)(2); United States v. Barron, 707 F.2d 125 (5th Cir. 1983).

8/ 7 J. Wigmore, Evidence § 2134, at 719 and n.2 (Chadbourn rev. 1978).

The defendants had ample opportunity to challenge the identity of the remainder of the document, to show how it came to be signed (as they did, at length), and to urge that, although signed, it was not intended to have legal effect. Whether the doucment was intended to be legally effective was then a separate question. Wolfe testified that shortly after the document was signed he went to Bossier Bank. Lynn, the bank vice president, asked about the progress of the negotiations, and Wolfe told him there had been some progress but the agreement was in suspense. Lynn prevailed upon Wolfe to let him see what Wolfe called the working draft. When Wolfe showed it to Lynn, Lynn then took it without Wolfe's consent and had it notarized. Wolfe said he then

picked up the copy and put it back in his briefcase. Thereafter, the FHA refused to reduce the balance on its mortgage of the Louisiana Pacific property so that it could be paid and cancelled, and the parties agreed that the lease was a "dead issue."

As proof that Triple Crown had never been the lessee of the dairy but had managed it for the account of Louisiana Pacific, the defendants introduced a management agreement signed by Louisiana Pacific and Triple Crown in February or March, 1984. The agreement purportedly reflected the relationship under which the two companies had been operating since September 1983. It stated that Louisiana Pacific remained the operator of the dairy and that the agreement was effective "as of September 1, 1983."

There was other evidence, however, from which the district court might have

believed, as it evidently did, that the lease was the real agreement between the parties. We note a few of the facts that might have supported such a conclusion. On behalf of Louisiana Pacific, DeMoss applied for benefits under the Dairy Production Stabilization Act and told the agricultural authorities that the dairy had been leased. A bank employee testified that, in January, 1984, he had discussed the milk diversion program with DeMoss and DeMoss told him that "they" were going to have to change the lease agreement to a management agreement to qualify for the program. He said DeMoss stated that the change was urgent, and DeMoss hoped the lawyers knew what they were doing.

In October 1983, Triple Crown applied for membership in a rural electric cooperative. If it had been

managing the dairy for Louisiana Pacific, a new membership would not have been needed. Johnny Terrell, Triple Crown's bookkeeper, wrote, "[p]lease be advised that as of September 1, 1983, Triple Crown Farms of Louisiana leased Riverland Dairy's operation. The new account should be billed as follows: Triple Crown Farms of Louisiana . . . ." Also in October, 1983, as secretary of Triple Crown, Terrell signed a milk marketing agreement with a milk producers association as if it were marketing milk for its own account. Wolfe testified that the parties executed the document in order to show the bank some progress in negotiations, yet he also said that he did not show Lynn the bank officer, the document until Lynn urged him to do so. The two statements appear to be inherently inconsistent.

G-1 was, therefore, properly received in evidence, the ruling was not conditional, and the evidence was sufficient to support the district court's conclusion that it reflected the true relationship between Louisiana Pacific and Triple Crown-- that of lessor and lessee.

III.

The defendants contend that the district court erred in denying their motion for acquittal at the close of the government's case. Because the defendants chose not to rely on this

motion, but to present evidence thereafter, they waived any objection to denial of the motion.[9/] If a defendant presents testimony and asks the jury to weigh the credibility of his witnesses against the evidence presented by the government, he cannot insulate himself

from the risk that his evidence will bolster the government's case by filing a motion before proceeding.[10/]

9/ See United States v. Rhodes, 631 F.2d 43, 44 (5th Cir. 1980); United States v. Evans, 572 F.2d 455, 479 (5th Cir.), cert. denied, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978), and cases cited therein.

10/ United States v. Rhodes, 631 F.2d 43, 44 (5th Cir. 1980); United States v. Belt, 574 F.2d 1234, 1236-37 (5th Cir. 1978).

IV.

Whittington and DeMoss contend that the evidence is insufficient to support their convictions. The evidence, viewed as a whole and considered most favorably to the verdict, as it must now be,[11/] was sufficient to warrant a guilty verdict by a reasonable trier of fact.[12/] Whittington and Wolfe admitted that they did in fact sign G-1. With the lease in

evidence, the case hinged on whether the judge believed the prosecution's case or the defendants' testimony. That was his province, not ours. Based on the document and other evidence the trier of fact believed that by November 29, 1983, Louisiana Pacific had leased

its dairy to Triple Crown. Therefore, the representations made by Whittington and DeMoss to government agencies that Triple Crown was managing the dairy for Louisiana Pacific, not leasing it, in order to obtain milk diversion program payments, were clearly in violation of federal statutes.

11/ Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680, ———— (1942).

12/ United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), aff'd, 462 U.S. 356, 103 S.Ct. 2358, 76 L.Ed.2d 638 (1983).

DeMoss also contends that the evidence was insufficient to convict him because it was inadequate to justify the conclusion that he knew the lease was in effect when he applied for milk subsidy benefits. He asserts that he was a part-time employee of Louisiana Pacific, not privy to the negotiations between Wolfe and Whittington, and that he acted only on the instructions of Whittington. DeMoss states that, when he first applied for government benefits, he was under the false impression that the dairy farm was leased. As token that he had not seen the lease, and was in fact unaware of its contents, he notes that at that time he informed the government office that the lease was for six months whereas G-1 was in fact for a different term. He urges that he believed Whitlington when Whittington later told him the

company did not have a lease. He contends that, in carrying papers to the government office in charge of the milk diversion program, he was nothing more than a "delivery boy." Indeed, DeMoss so testified. But the trier of fact simply did not believe DeMoss and believed the other evidence that pointed to his knowing complicity in the conspiracy.

V.

Wolfe was acquitted of the charges in counts two and three. He was convicted of the charge in count one, joining in a conspiracy with Whittington and DeMoss, and of the charge in count four, aiding and abetting Whittington in the preparation of the management agreement with the knowledge that this was intended to influence the government's action.

Wolfe contests the sufficiency of the evidence to warrant these convictions. He argues there was testimony that the management agreement was needed for Louisiana Pacific's bankruptcy proceedings, as well as testimony ample to support Wolfe's position--and indeed there was. This, however is not the test.[13/] There was also ample evidence from other sources that warranted the conclusion that Wolfe joined in a conspiracy with Whittington and DeMoss and that he willingly aided and abetted Whittington. As Wolfe correctly points out, 18 U.S.C. § 1001 is a specific intent offense.[14/] Therefore, if he believed in good faith that the purported lease was not a binding and legally enforceable

obligation, either because he was ignorant of the law or was ill-informed,

and if the trier of fact believed this, he could not be convicted.[15/] The court, however, after seeing and hearing Wolfe, chose not to believe him and found that he acted knowingly and willfully. In view of the evidence in the record, we refuse to second-guess the trial court.

13/ See supra notes 11 and 12.

14/ United States v. Lange, 528 F.2d 1280, 1286 n. 10 (5th Cir. 1976)

15/ Compare U.S. v. Burton, 737 F.2d 439 (5th Cir. 1984).

VI.

As their last-ditch defense, the defendants contend that prosecutorial misconduct restricted their constitutional rights to compulsory process and due process by intimidating potential defense witnesses into asserting the fifth amendment. This argument has three subparts. The defendants maintain that

(1) the trial court improperly permitted the witnesses to invoke the fifth amendment; (2) if the witnesses were entitled to invoke the fifth amendment, this act was compelled by government intimidation in violation of the defendants' due process rights; and (3) in any event, the court should have directed the government to

grant the defense witnesses use immunity because they possessed exculpatory testimony essential to the defense.

Specifically, the defendants maintain that Johnny Terrell, Triple Crown's bookkeeper, and Murray Lynn, a vice president of Bossier Bank, each had given a statement to federal investigators or, in Terrell's case, had testified before the grand jury to facts that supported the defenants' version of events. Each had been subpoenaed to testify for the

defense. On the day trial began, however, the prosecution served a subpoena on Lynn to testify for the government. Although Terrell had previously appeared before a grand jury to testify about the matters involved in this case and had been indicted for perjury, Lynn had not yet given testimony in any judicial proceeding. The defendants argue that, since Lynn's prospective testimony would have been favorable to their case, the only purpose for the subpoena was to intimidate Lynn and to imply that Lynn might likewise be indicted if he testified to the same facts as he had given federal investigators. Terrell and Lynn informed the district court that they would refuse to testify on the ground that their testimony might incriminate them.

The defendants argue that the district court improperly upheld the

witnesses' claim of privilege because the witnesses were not in fear of prosecution for past conduct, a necessary condition for invoking the fifth amendment. Instead, the defen-

dants claim that the witnesses were intimidated by prosecution threats of an indictment if they chose to testify truthfully at the trial.

Under this standard, the district court properly sustained Terrell's invocation of the privilege. The district judge held an in camera hearing and determined that Lynn was entitled to fifth amendment protection as well. The record of that hearing shows that Lynn was already under investigation for obstruction of justice for giving false information in statements to government agents. If Lynn testified at the trial, there were two possible consequences:

Either Lynn would testify contrary to his prior statements to the government agents, thus providing evidence that those statements were false, or he would testify in conformity with his prior statements, thereby adding a perjury count to the possible indictment for obstruction of justice. The record thus supports the judge's determination that Lynn had a legitimate fear of prosecution and was entitled to invoke the fifth amendment.

A witness may not claim the privilege of the fifth amendment out of fear that he will be prosecuted for perjury for what he is about to say.[16/] The shield against self-incrimination in such a situation is to testify truthfully, not to refuse to testify on the basis that the witness may be prosecuted for a lie not yet told. A

witness may, however, claim the privilege if his testi-

mony may suggest that he has already committed a crime, for example, perjury in a prior proceeding.[17/]

16/ United States v. Partin, 552 F.2d 621, 632 (5th Cir.), cert. denied, 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977).

17/ Id. See Also United States v. Wilcox 450 F.2d 1131, 1141 (5th Cir. 1971) cert. denied, 405 U.S. 917, 92 S.Ct. 944, 30 L.Ed. 787 (1972).

Second, the defendants contend that the government interfered with their right to a fair trial by intimidating Lynn and Terrell. The defendants complain that the intimidation is evidenced by the indictment of Terrell

for perjury because of his earlier testimony before a grand jury that the lease never took effect, by the threat to Lynn of a similar indictment if he so testified at the trial, and by the government's refusal to grant these witnesses immunity so that they might testify without fear of reprisal.

The Supreme Court has held that the sixth amendment right to compulsory process guarantees a criminal defendant the right to present witneses to establish his defense.[18/] This right is not unlimited; the defendants' sixth amendment rights do not override the fifth amendment rights of others.[19/] Nonetheless, substantial governmental interference with a defense witness' choice to testify may violate the due process rights of the defendant.[20/]

18/ Washington v. Texas, 388 U.S. 14, 17-19, 87 S.Ct. 1920, 1922-23, 18 L.Ed.2d 1019, ——— (1967).

19/ United States v. Lacouture, 495 F.2d 1237 (5th Cir.), cert. denied, 419 U.S. 1053, 95 S.Ct. 631, 42 L.Ed.2d 648 (1974).

20/ United States v. Goodwin, 625 F.2d 693, 703 (5th Cir. 1980).

In some instances, we have held that government conduct so intimidated a potential defense witness as to deprive the defendant of his due process rights. Thus, in United States v. Hammond,[21/] we found such a violation when an FBI agent told a defense witness during a trial recess that the witness would have "nothing but trouble" if he persisted in his testimony and then subpoenaed the witness to appear before a grand jury, with the result that the witness subsequently asserted the fifth amendment. Similarly, the Third Circuit held in United States v. Morrison[22/] that the government had improperly intimidated a defense witness by issuing a subpoena

to her and conducting a personal interview with her in which the United States Attorney warned that she might be prosecuted on drug charges and that she might be prosecuted for perjury if she testified at the defendant's trial. The court further held that, if this witness invoked the fifth amendment at the retrial, the court was to direct the government to grant her use immunity.[23/]

21/ 598 F.2d 1008 (5th Cir. 1979). See also United States v. Henricksen, 564 F.2d 197 (5th Cir. 1977) (defense witness intimidated by terms of a plea bargain).

22/ 535 F.2d 223 (3rd Cir. 1976).

23/ Id. at 229. See also United States v. Thomas, 488 F.2d 334 (6th Cir. 1973) (defense witness intimidated by remarks by assistant United States attorney).

A prosecutor may, however, engage in proper investigatory actions if his

conduct is not designed to intimidate a witness. The prosecutor's hands are not tied so tightly as to prevent good faith efforts to avert perjury or to investigate past offenses. Thus, we refused to find reversible error in the government's conduct in United States v. Fricke,[24/] when the prosecution informed prospective defense witnesses that they were already targets of a grand jury investigation. We held that, so long as the investigation of witnesses is not prompted by the possibility of the witnesses testifying, and so long as the government does not harass or threaten them, the defendant's rights are not violated.[25/]

24/ 684 F.2d 1126 (5th Cir. 1982), cert. denied, 460 U.S. 1011, 103 S.Ct. 1250, 75 L.Ed.2d 480 (1983).

25/ Id. at 1130.

In this case, Lynn had been under investigation for obstruction of justice before the trial. We had quashed an earlier grand jury subpoena issued to him because we concluded that the United States attorney was using the grand jury as a discovery tool. The issuance of another subpoena to Lynn in court just prior to his testimony was unseemly, but we do not think it has been shown to constitute a deprivation of the defendants' due process rights. The government's investigation of Lynn was not prompted by Lynn's prospective testimony as a defense witness. Nor did the prosecution attempt to intimidate Lynn by warning him of the consequences of testifying in the manner that was found so offensive in Hammond and Morrison. The government simply told Lynn that it believed he had already

given false statements to government agents and that, if he repeated those statements under oath at trial, they would support an indictment for perjury. We do not feel that this was governmental interference in violation of the defenants' due process rights.

As their third argument, the defendants assert that the district court ought to have directed the government to grant Lynn and Terrell use immunity because of the essential exculpatory nature of their testimony. The defendants, however, were not entitled to have their witnesses immunized from prosecution either for past conduct or, of course, for perjury if they testified falsely at the trial. In this circuit, the compulsory pro-

cess clause does not entitle the defendant to require the government to

grant immunity of his witnesses.[26/] Although the Third Circuit has held differently,[27/] we have rejected its view and held in Autry v. Estelle[28/] that in the absence of governmental abuse the court may not direct the government to grant use immunity to a defense witness who invokes the fifth amendment.

26/ Mattheson v. King, 751 F.2d 1432, 1433 (5th Cir. 1985); Autry v. Estelle, 706 F.2d 1394, 1401 (5th Cir. 1983), cert. denied, 104 S.Ct. 1458 (1984); U.S. v. Chagra, 669 F.2d 241, 259-61 (5th Cir.), cert. denied, 459 U.S. 846, 103 S.Ct. 102, 74 L.Ed.2d 92 (1982); United States v. Thevis, 665 F.2d 616, 639-41 (5th Cir.), cert. denied, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982).

27/ See Government of Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980).

28/ 706 F.2d 1394, 1401 (5th Cir. 1983).

VII.

For the reasons out above, the judgment of conviction as to each defendant is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 84-4813

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICHARD A. WHITTINGTON,
RICHARD WOLFE, and
W. LEWIS DeMOSS, JR.,
Defendants-Appellants.

Appeals from the United States District Court for the Western District of Louisiana

---

ON PETITIONS FOR REHEARING
April 2, 1986

Before RUBIN, RANDALL, and WILLIAMS, Circuit Judges.

RUBIN, Circuit Judge:

We affirmed the conviction of three defendants for submitting a false claim for benefits under the Dairy Production Stabilization Act of 1983.[1/] Defendants Whittington, Wolfe, and DeMoss have filed this petition for rehearing contending that we improperly sustained the district court's ruling which permitted

two defense witnesses, who allegedly possess exculpatory testimony essential to the defense, to invoke the fifth amendment. For the reasons set out below, we deny the petition.

1/ United States v. Whittington, No. 84-4813, slip op. at 4260 (5th Cir. Feb. 27, 1986).

The defendants subpoenaed Murray Lynn, a bank vice president, and Johnny Terrell, a bookkeeper, to tesify for the defense. Each had previously given

federal investigators similar statements that supported the defenants' version of events. Terrell had repeated these statements to a grand jury and had been indicted for perjury; Lynn was under investigation for obstruction of justice for giving false information in his statement to government agents. At trial both men asserted the fifth amendment. Because Terrell had been indicted for perjury after testifying about the same matters, the district court sustained his invocation of the privilege. The district court held an in camera hearing on Lynn's entitlement to fifth amendment protection. At the hearing Lynn testified that the United States attorney was investigating him to determine whether he had obstructed justice and that he feared he would be indicted for perjury if he testified at trial in accordance with his statement to the

federal agents. The district judge upheld Lynn's assertion of the privilege.

In our panel opinion, we stated:

> A witness may not claim the privilege of the fifth amendment out of fear that he will be prosecuted for perjury for what he is about to say. The shield against self-incrimination in such a situation is to testify truthfully, not to refuse to testify on the basis that the witness may be prosecuted for a lie not yet told. A witness may, however, claim the privilege if his testimony may suggest that he has already committed a crime, for example, perjury in a prior proceeding.[2/]

2/ Id., slip op. at 4273 (citations omitted).

The defendants agree with this statement of principle, but contend that we misapplied it to the facts of the case. They argue that the fifth amendment privilege can never be invoked out of fear of perjury if the witness

plans to testify in conformity with his prior testimony or statements to government agents, regardless of the truth or falsity of the earlier testimony (statements). The defendants summarize their argument thus: if the witness' prior statement is false and the witness intends to testify consistently (that is, lie) at trial, the privilege cannot be raised because a "witness may not claim the privilege of the fifth amendment out of fear that he will be prosecuted for perjury for what he is about to say;" if the witness' prior statement is true and the witness intends to testify consistently at trial, the fifth amendment may not be invoked because there

would be no tendency to incriminate since the prior statement would not have constituted obstruction of justice, and

the trial testimony would not be perjurious. Because we cannot accept such a categorical characterization of the limitations of the fifth amendment, we deny the petition.

The defendants' argument fails to consider that all testimony cannot be pigeonholed as "true" or "untrue," "consistent" or "inconsistent." Questions may be framed differently, memories may fade, recollections may be imprecise, and the implications conveyed in the testimony may contradict a witness' prior statements. This understanding is implicit in the test construed by the Supreme Court for determining whether a witness has properly invoked the fifth amendment privilege: whether the answers might "furnis[h] a link in the chain of evidence needed in a prosecution..."[3/] or whether the witness has "reasonable cause

to apprehend danger from a direct answer."[4/] To be privileged, testimony need not be certain to result in a finding of guilt, it need have only a tendency to incriminate,[5/] though the possibility of self-incrimination must not be "remote and speculative."[6/] As the Court said in Kastigar v. United States: the fifth amendment privilege "protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution..."[7/]

3/ Blau v. United States, 340 U.S. 159, 161, 71 S.Ct. 223, 224, 95 L.Ed. 170, ——— (1950).

4/ Hoffman v. United States, 341 U.S. 478, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118, ——— (1951).

5/ See McCormick's Handbook of the Law of Evidence § 138, at 292 (E. Cleary 2d ed. 1972).

6/ Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472, 478, 92 S.Ct. 1670, 1675, 32 L.Ed.2d 234,

239 (1972).

7/ 406 U.S. 441, 444-45, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212, ——— (1972).

When applying the test, the court must give due regard to the policy considerations that underlie the fifth amendment guarantee. These include protection of the innocent from unwarranted conviction.[8/] A third-party witness in the position of either Lynn or Terrell, indicted or under investigation because of the alleged untruth of prior statements that relate directly to the substance of their prospective testimony has many of the concerns of a defendant who is assessing the question whether he should testify in his own defense. As the Supreme Court noted in Wilson v. United States,[9/] "Excessive timidity, nervousness when facing others and attempting to explain

transactions of a suspicious character, and offenses charged against him, will often

confuse and embarrass [a defendant who might testify in his own defense]." Such emotional factors might betray the witness into giving answers that are inconsistent with his prior statements and thus tend to incriminate him for the falsity of those prior statements, even though the witness is consciously attempting to be truthful and had the same intention when he gave his earlier statements or testimony. While he need not be directly concerned about his performance before this jury, he must be concerned about providing ammunition to the goverment if his own trial or indictement is imminent.

8/ See Wilson v. United States, 149

U.S. 60, 13 S.Ct. 765, 37 L.Ed. 650 (1893). See also McCormick's Handbook of the Law of Evidence § 118, at 252 (E. Cleary 2d ed. 1972); 8 Wigmore on Evidence § 2251, at 310 (McNaughton rev. 1961). But see 8 Wigmore on Evidence § 2251, at 311 n.3(1) (McNaughton rev. 1961).

9/ 149 U.S. 60, 66, 13 S.Ct. 765, 766, 37 L.Ed. 650, ———— (1893).

The defendants' analysis is simplistic for another reason: it fails to consider the possibility that the witness may have another justification supporting his assertion of the privilege besides that of revealing prior perjury. Perhaps the witness committed some other offense connected with the same events. He might then be justly concerned that the questioning at the present trial, either in direct or cross-examination, might, if

the privilege were not invoked, range into matters other than those covered in

the prior testimony or statement. In such a case his answers might, of course, be incriminatory.

Considering the Supreme Court's analysis of the fifth amendment and the policy considerations underlying it, the district court properly upheld both Terrell's and Lynn's assertion of the privilege. The United States attorney had already sought an indictment of Terrell for his statements concerning the subject matter of his prospective testimony. Lynn had been told that, if he repeated his earlier statements under oath, he likewise would be indicted. If Lynn had testified at the defendants' trial in conformance with his prior statements to government agents he might have added a perjury count to the possible indictment for obstruction of justice. Using the test outlined by the

Court in Kastigar, such testimony "could be used in a criminal prosecution."[10/]

10/ See also United States v. Zirpolo, 704 F.2d 23, 25 (1st Cir.) cert. denied, 464 U.S. 822, 104 S.Ct. 87, ——— L.Ed.2d ——— 1983).

Finally, we are mindful that the trial "judge necessarily is accorded broad discretion in determining the merits of a claimed privilege and the measures to be taken as result of a valid fifth amendment claim."[11/] The judge must weigh "the implications of

the question, in the setting in which it is asked."[12/] Here the trial court had ample justification for permitting the witnesses to invoke the fifth amendment and we once again affirm its decision.

11/ United States v. Lyons, 703 F.2d 815

818 (5th Cir. 1983) (cases cited therein); United States v. Van DeVeer, 577 F.2d 1016, 1017 (5th Cir. 1978).

12/ Hoffman, 341 U.S. at 486, 71 S.Ct. at 818, 95 L.Ed. at _____.

No. 85-1974

Supreme Court, U.S.
FILED
AUG 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD A. WHITTINGTON AND
W. LEWIS DEMOSS, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT L. GAMBALE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the district court should have granted immunity to two prospective defense witnesses.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Autry v. *Estelle*, 706 F.2d 1394, cert. denied, 465 U.S. 1085 5

Daley, In re, 549 F.2d 469, cert. denied, 434 U.S. 829 5

Government of Virgin Islands v. *Smith*, 615 F.2d 964 5-6

Pillsbury Co. v. *Conboy*, 459 U.S. 248 ..... 5, 6

Thompson v. *Garrison*, 516 F.2d 986, cert. denied, 423 U.S. 933 5

United States v. *Alessio*, 528 F.2d 1079, cert. denied, 426 U.S. 948 5

United States v. *Allstate Mortgage Corp.*, 507 F.2d 492, cert. denied, 421 U.S. 999 5

United States v. *Burns*, 684 F.2d 1066, cert. denied, 459 U.S. 1174 7

United States v. *Caldwell*, 543 F.2d 1333, cert. denied, 423 U.S. 1087 5

United States v. *Graham*, 548 F.2d 1302 5

Page

Cases—Continued:

United States v. *Heffington*, 682 F.2d 1075, cert. denied, 459 U.S. 1108 5

United States v. *Herbst*, 641 F.2d 1161, cert. denied, 454 U.S. 851 5

United States v. *Karas*, 624 F.2d 500, cert. denied, 449 U.S. 1078 5

United States v. *Lenz*, 616 F.2d 960, cert. denied, 447 U.S. 929 5

United States v. *Lowell*, 649 F.2d 950 6

United States v. *Thevis*, 665 F.2d 616, cert. denied, 456 U.S. 1008 5

United States v. *Turkish*, 623 F.2d 769, cert. denied, 449 U.S. 1077 5

Constitution and statutes:

U.S. Const. Amend. V 3

Dairy Production Stabilization Act of 1983, Pub. L. No. 98-180, 97 Stat. 1128 *et seq.* 2

18 U.S.C. 287 2

18 U.S.C. 371 2

18 U.S.C. 1001 2

18 U.S.C. 6003(b) 5

Miscellaneous:

Note, *The Case Against a Right to Defense Witness Immunity*, 83 Colum. L. Rev. 139 (1983) 5

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1974

RICHARD A. WHITTINGTON AND
W. LEWIS DEMOSS, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. la-42a) is reported at 783 F.2d 1210. The opinion of the court of appeals on rehearing (Pet. App. 43a-55a) is reported at 786 F.2d 644.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1986. A petition for rehearing was denied on April 2, 1986. The petition for a writ of certiorari was filed on May 30, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Western District of Louisiana, petitioners were convicted on two counts of making material false

statements to the United States Department of Agriculture ("USDA") for the purpose of receiving milk subsidies, in violation of 18 U.S.C. 1001; on one count of submitting a false claim for milk subsidies, in violation of 18 U.S.C. 287; and on one count of conspiring to commit those offenses, in violation of 18 U.S.C. 371. Petitioner Whittington was sentenced to a five-year term of probation, fined $10,000, and ordered to pay restitution of $69,830.85. Petitioner DeMoss was sentenced to a five-year term of probation and fined $10,000. The court of appeals affirmed (Pet. App. la-42a).

1. The evidence at trial, the sufficiency of which is not now challenged, is detailed in the opinion of the court of appeals (Pet. App. 2a-27a). Briefly, it showed that petitioners and co-defendant Richard Wolfe[1] conspired to obtain USDA milk subsidies to which they were not entitled under the Dairy Production Stabilization Act of 1983, Pub. L. No. 98-180, 97 Stat. 1128 *et seq.*

In June 1983, petitioners were officers and members of the board of directors of Louisiana Pacific Resources, Inc. (Louisiana Pacific), which operated a dairy farm known as the Riverland Dairy (Pet. App. 3a). By the summer of 1983, Louisiana Pacific's dairy operations had become unprofitable; petitioner Whittington accordingly began negotiations looking toward the sale of the dairy's property to Wolfe (*id.* at 4a-7a). Petitioners and Wolfe, however, wished to keep the dairy in business during the negotiations so that it might qualify for milk subsidy payments under the Dairy Production Stablization Act, which was then pending in Congress. Accordingly, they arranged for Louisana Pacific to lease the dairy to another company, Triple Crown Farms. A written lease was executed in September 1983 (*id.* at 7a; GX G-1).

---

[1]Wolfe was convicted of conspiracy and making a false statement (Pet. App. 12a).

The milk subsidy statute was enacted later that year. To petitioners' surprise, however, it provided that a dairy operator could qualify for a subsidy only if it had been producing milk in 1982 *and* still was engaged in milk production as of November 29, 1983. Because petitioners had leased their dairy to Triple Crown in September 1983, and thus were not operating it on November 29, 1983, they did not qualify for a subsidy.[2] Petitioners nevertheless applied for a subsidy, falsely representing to USDA that Triple Crown was managing the dairy for them. A few months later, in April 1984, petitioners received a $139,741.40 subsidy payment based on their false claims. Pet. App. 3a, 9a, 20a-22a, 24a-25a.

2. At trial, Murray Lynn, a vice-president of Lousiana Pacific's bank, and Johnny Terrell, Triple Crown's bookkeeper, were subpoenaed as prospective defense witnesses. Both Lynn and Terrell had earlier told government investigators that the dairy had not been leased to Triple Crown, asserting instead that Triple Crown had acted as a managing agent for Louisiana Pacific (Pet. App. 30a, 45a). Terrell also had testified before a grand jury that the arrangement between Triple Crown and Louisiana Pacific was a management agreement rather than a lease (*ibid.*). Prior to petitioner's trial, Terrell had been indicted for perjury based upon that testimony, and Lynn had been advised that he was under investigation for obstruction of justice for giving false information about the case to the government agents (*ibid.*).

When Lynn and Terrell appeared at trial in response to the defense subpoenas, they refused to testify, asserting their Fifth Amendment privilege against compelled self-incrimination. The district court upheld Terrell's assertion of the privilege because he had been indicted for perjury

---

[2]Triple Crown also was ineligible for the subsidies because it had not been operating the dairy in 1982 (Pet. App. 9a).

based on his grand jury testimony about the matters at issue at trial (Pet. App. 45a). The district court also upheld Lynn's invocation of the privilege (*ibid.*). Petitioners then requested the district court to grant immunity to Lynn and Terrell so that they would be available to testify for the defense, although petitioners made no showing that either Lynn or Terrell actually would testify favorably to the defense if they were granted immunity (see II-B Tr. 293-276, 293-279). The court denied that request, observing that the "[g]ranting of immunity is an executive act" (*id.* at 293-276).

The court of appeals (Pet. App. 29a-42a) upheld the district court's refusal to immunize Lynn and Terrell. The court of appeals rejected petitioners' claim that the government had attempted to intimidate Lynn and Terrell, finding that prosecutorial action directed against those individuals had been prompted by legitimate law enforcement objectives (*id.* at 34a-39a).[3] And the court of appeals affirmed the district court's conclusion that it lacked the authority to immunize defense witnesses, holding that "in the absence of governmental abuse the [district] court may not direct the government to grant use immunity to a defense witness who invokes the fifth amendment" (*id.* at 40a-41a).[4]

ARGUMENT

Petitioners contend (Pet. 22-31) that the refusal of the courts below to immunize prospective defense witnesses Lynn and Terrell conflicts with decisions of this Court and of the Second and Third Circuits.

---

[3]Petitioners also complained that Lynn was served another subpoena in court just prior to his testimony. The court concluded (Pet. App. 39a) that, although that government action was "unseemly," it did not compromise the fairness of the trial.

[4]The court of appeals also rejected petitioners' contention, which they do not raise here, that the prospective witnesses' assertion of their privilege should not have been sustained (Pet. App. 31a-34a, 46a-54a).

1. Contrary to petitioners' claim (Pet. 28-30), this Court never has recognized the existence of judicial authority to immunize defense witnesses. The federal immunity statute (18 U.S.C. 6003(b)) vests the power to grant immunity in the Executive Branch rather than the Judiciary. The Court accordingly has explained that the authority to immunize witnesses "is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity." *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983). See *id.* at 253-254. The corollary of this principle, of course, is that "[n]o court has authority to immunize a witness" (*id.* at 261; see *id.* at 262). Not surprisingly, then, the courts of appeals have held overwhelmingly that judges may not immunize defense witnesses without a request from the prosecution.[5]

2. Despite this authority, the Third Circuit has held that a district court may immunize a defense witness when that witness has essential exculpatory information that is unavailable from other sources. See *Government of Virgin Islands*

---

[5]See, *e.g.*, *Autry* v. *Estelle*, 706 F.2d 1394, 1401-1402 (5th Cir. 1983), cert. denied, 465 U.S. 1085 (1984); *United States* v. *Heffington*, 682 F.2d 1075, 1080-1081 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); *United States* v. *Thevis*, 665 F.2d 616, 638-641 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *Herbst*, 641 F.2d 1161, 1168 (5th Cir.), cert. denied, 454 U.S. 851 (1981); *United States* v. *Karas*, 624 F.2d 500, 505 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Turkish*, 623 F.2d 769, 771-779 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States* v. *Lenz*, 616 F.2d 960, 962 (6th Cir.), cert. denied, 447 U.S. 929 (1980); *In re Daley*, 549 F.2d 469, 479-480 (7th Cir.), cert. denied, 434 U.S. 829 (1977); *United States* v. *Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *United States* v. *Caldwell*, 543 F.2d 1333, 1356 n. 115 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976); *United States* v. *Alessio*, 528 F.2d 1079, 1081-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976); *Thompson* v. *Garrison*, 516 F.2d 986, 988 (4th Cir.), cert. denied, 423 U.S. 933 (1975); *United States* v. *Allstate Mortgage Corp.*, 507 F.2d 492, 494-495 (7th Cir.), cert. denied, 421 U.S. 999 (1974). See also Note, *The Case Against a Right to Defense Witness Immunity*, 83 Colum. L. Rev. 139 (1983).

v. *Smith*, 615 F.2d 964 (3d Cir. 1980). Whatever the validity of the Third Circuit's rule, it is applicable by its terms only when the defendant makes "a convincing showing" that the proffered testimony is "clearly exculpatory" and "essential to the defendant's case." In addition, "[i]mmunity will be denied if the proffered testimony is found to be * * * cumulative." *Id.* at 972. The Third Circuit thus has found a judicial grant of immunity appropriate only when there is "a probable certainty that * * * [the] expected testimony * * * would * * * *in itself* exonerate [the defendant]." *United States* v. *Lowell*, 649 F.2d 950, 965 (3d Cir. 1981) (emphasis in original).

There is no need for the Court to reconcile the conflicting rules stated by the Third Circuit and the court below, because petitioners have failed to satisfy even the Third Circuit's requirements for a judicial grant of immunity.[6] Petitioners made no proffer concerning the testimony of Lynn and Terrell, and thus failed to show that the prospective witnesses would have testified favorably to the defense—let alone that their evidence "in itself" would have exonerated petitioners.[7] Nor was there any showing that

---

[6]Even apart from the inapplicability of the Third Circuit standard on the record here, that court has not addressed the propriety of it in any case since this Court's decision in *Pillsbury Co.* v. *Conboy, supra.* The Third Circuit thus has not yet had an opportunity to consider the implications of the *Conboy* analysis for its immunity approach. Until it does so, there will be no need for this Court to address the validity of the Third Circuit's pre-*Conboy* standard.

[7]We note that both Lynn and Terrell offered their exculpatory versions of the arrangement between petitioners and Triple Crown prior to the return of any indictment and prior to the government's accumulation of substantial evidence showing that Triple Crown had in fact leased the dairy from petitioners. On the other hand, the witnesses' refusal to testify at trial came after those developments and after the alleged falsity of their prior statements led to their own legal difficulties. These circumstances suggest that, if the witnesses were immunized, they very well might have contradicted their prior statements and further undermined the defense.

Lynn and Terrell were essential defense witnesses. To the contrary, all three defendants (including the signatories of the Triple Crown lease, Whittington and Wolfe), as well as the attorneys for Whittington and Triple Crown, testified for the defense concerning the nature of the agreement between Louisiana Pacific and Triple Crown. See, *e.g.*, II-B Tr. 293-249 to 293-260; III Tr. 356; V Tr. 604-606, 617, 646-648, 727-745. The testimony of Lynn and Terrell, even if favorable to the defense, would thus have been entirely cumulative.

3. Petitioners also note (Pet. 30-31) that the Second Circuit has articulated a standard permitting district courts to direct the government to request immunity for a defense witness when "(1) the government has engaged in a discriminatory use of immunity to gain a tactical advantage or, through its own overreaching, has forced the witness to invoke the Fifth Amendment; and (2) the witness' testimony will be material, exculpatory and not cumulative." *United States* v. *Burns*, 684 F.2d 1066, 1077 (2d Cir. 1982), cert. denied, 459 U.S. 1174 (1983). Petitioners assert that the application of this standard to their case would require a grant of immunity to Lynn and Terrell. In fact, however, the court below appears to have applied a standard quite similar to the one urged by petitioners (see Pet. App. 36a-37a, 41a). In doing so, the court of appeals, like the district court, rejected petitioners' claims of government overreaching or misconduct (*id.* at 32a-40a; III Tr. 311-316). This factual finding, which is fatal to petitioners' position, does not warrant review by the Court.[8]

---

[8]Petitioners' claim would fail in the Second Circuit for a wholly independent reason as well: as noted above, they failed to make a showing that the testimony at issue would be either exculpatory or noncumulative.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT L. GAMBALE
Attorney

AUGUST 1986